SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN and FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari

MOTION FOR LEAVE TO FILE REPLY MEMORANDUM AND REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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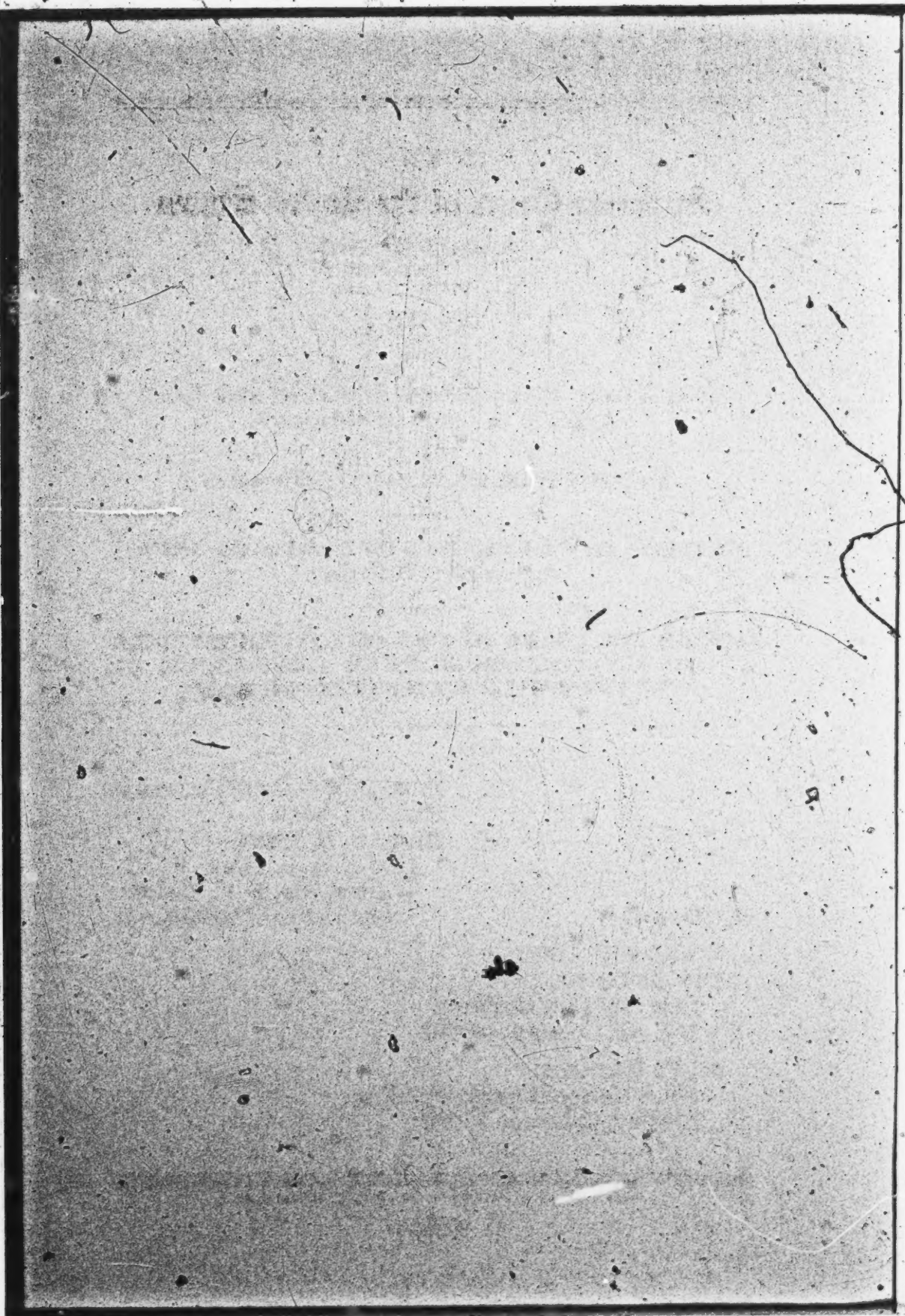

INDEX

	Page
Motion for Leave to File Reply Memorandum	1
Reply Memorandum to Memorandum of the United States in Opposition	3

CITATIONS

CASES:

Campbell v. *United States*, 365 U.S. 85 (1961)	9
Dennis v. *United States*, 384 U.S. 855 (1966)	10
Katz v. *United States*, 36 U.S.L.W. 4080 (December 18, 1967)	9
Lilburne's Trial, 4 How. St. Tr. 1269-(1649)	3
United States v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924)	8-9
United States v. *Black*, Crim. Nos. 650-63, 651-63, D.D.C., on remand, 385 U.S. 26 (1966)	4 *et seq.*
United States v. *Procter & Gamble Co.*, 174 F. Supp. 233 (D.N.J. 1959), on remand, 356 U.S. 677 (1958)	10

STATUTES AND RULES:

5 U.S.C. §§ 554-57	8
Federal Rule of Criminal Procedure 16(e)	10

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MOTION FOR LEAVE TO FILE REPLY MEMORANDUM

Petitioners, through their undersigned counsel, move this Court for leave to file the attached memorandum in reply to the "Memorandum for the United States in Opposition". The grounds for this motion are that the government's memorandum introduces questions of fact and law to which reply is appropriate. It is

believed that this reply will aid the Court in its determination of the petition for rehearing.

Respectfully submitted,

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REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

The government's memorandum asserts propositions both of law and of fact in support of its startling assertion that a committee of Justice Department lawyers, acting on information vouchsafed them by the FBI, has the power to foreclose judicial inquiry into admitted violations of the Fourth Amendment. This memorandum addresses itself to propositions of fact underlying petitioners' lack of confidence in the Justice Department's *in camera* determinations, and propositions of law, with roots tracing to Lilburne's day,* affirming that the Justice Department's policy is at war with the Bill of Rights concept of adversary litigation.

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* See 4 How. St. Tr. 1269, 1273 (1649).

I. The Justice Department's Examination Does Not, In Fact, Lead to the Discovery of Truth

The government cites, Gov't Mem., p. 8, a string of cases in which its statements that illegal eavesdropping did not taint its case have been upheld by courts. How vigorous the challenge was in any of those cases, or how thorough the examination, does not, of course, appear. In the pleadings filed heretofore, petitioners have cited instances which would counsel against always giving implicit faith to the government's "no-taint" assurances. Petitioner invites the Court's attention to the following additional instance, which developed since the Court's order of December 4 that the Solicitor General file his memorandum herein.

In *United States* v. *Black,* Crim. Nos. 650-63, 651-63, D.D.C., on remand, 385 U.S. 26 (1966), a hearing on a motion for discovery and inspection of the fruits of electronic surveillance began before District Judge William B. Jones in December 1967. On December 13, 1967, Justice Department attorney Charles J. Alexander said in open Court, referring to the intra-Bureau memoranda prepared by FBI Agent Pennypacker from the logs of microphone surveillance:*

> "The Federal Bureau of Investigation couldn't have cared less about Mr. Black's tax case. If that is true, then I say, if at this stage it is not going to have any great detail about his tax case in this material." Transcript of Proceedings, December 13, 1967, p. 376.

Mr. Alexander had been assigned to the *Black* case shortly after this Court's remand order and had per-

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* Pennypacker supervised both the legal and the illegal parts of the Black investigation. Transcript of Proceedings, December 18, 1967, p. 563.

sonally attempted to acquaint himself with the extent of electronic surveillance. He had done this by sending memoranda, through channels, to the FBI, and getting back certain information, through channels, from the FBI. Id., December 11, 1967, pp. 43-47.

The representation by Mr. Alexander concerning the *Black* tax case turned out to be very much in error when, five days later, the government, by order of Judge Jones, turned over these "Airtels" (intra-Bureau messages) prepared by Agent Pennypacker. *Id.*, December 18, 1967, p. 596.* They reveal a deep FBI interest in the tax case:

"Mr. Wadden: * * *

There are 8 AIRTELS asking action by the Kansas City office that obviously originate out of the information that come [sic] from the bug. I certainly think we have a right to that, such as one AIRTEL goes out and tells them to try to identify all witnesses appearing before the grand jury. We ought to know what they did in connection—

The Court: I think you are right. * * *" *Id.* at p. 576.

* * * * *

"Mr. Wadden: * * *

Your Honor, if you may remember, we got the same type of argument that goes on and on and Your Honor finally makes up his mind, last Thursday when we were told that the FBI investiga-

* The Airtels were turned over to defense counsel in the *Black* case under a protective order against their disclosure. The material in this memorandum is drawn entirely from the transcript of proceedings in open court. The Airtels referred to are, of course, available to this Court.

tion had absolutely nothing to do with the tax case. We finally got the AIRTELS, Your Honor, and Your Honor knows, several places such as AIRTEL of the 15th of March, Your Honor, at the end of it it says this information is of no interest to the tax case so will not be disseminated to the Kansas City office.

"Another one starts out, Your Honor, this information primarily designated on Black's tax case. * * *" *Id.* at 594-95.

* * * * *

"The Court: An AIRTEL is prepared at headquarters, a copy goes to Kansas City: check on the grand jury witness and give us a report. I understand a reply would be made to the Washington Field Office, am I correct?

A. [by FBI Agent Pennypacker]: Yes, sir.

The Court: A copy would go to headquarters?

A. In the normal order of correspondence, if a copy goes to headquarters the original would go to headquarters and a copy to Washington Field. I don't recall at this point how Kansas City handled it.

The Court: In any event it would be in the Washington Field Office. Now certainly that seems to be a document that pertains to the Black tax case, it was the Black grand jury, you certainly would agree?

A. Yes." *Id.* at 605-06.

Mr. Alexander's veracity is obviously not being challenged. What is in issue is the difference in result between an *in camera* and *ex parte* proceeding and one in which, by the often tedious and slow process of adversary inquiry, a semblance of truth begins to emerge.

Mr. Alexander, the government must concede, was a lawyer "subject to professional standards, carefully chosen by [his] superiors," Gov't Mem., pp. 5-6, and he is assuredly an "officer of the court," *Id.* at 3.

It appears, moreover, from the government's memorandum filed herein that the intradepartmental examination extends only to the overheard conversations themselves, and not to investigative reports reflecting leads or evidence obtained as fruits of the illegality. The *Black* case makes patent the unreliability of such an examination, for it was not the logs of recorded conversations but the secondary materials that revealed FBI concern with Black's tax case. Because Mr. Alexander's investigation apparently did not extend to the secondary material, he found himself making his December 13 representation. As Agent Pennypacker made clear, surveillance whose purpose is intelligence-gathering is primarily useful as a means of obtaining leads for investigation of the target subject through compiling information on his activities and the activities of every person with whom he came in contact. Transcript of Proceedings, December 18, 1967, pp. 563-64, 610 (testimony of Agent Pennypacker).*

One wonders whether the government's *Schipani-Kolod* policy would have required disclosure in *Black* had not an attorney-client invasion been discovered. Wonderment increases as one reads Memorandum for the United States, *Black* v. *United States*, No. 1029,

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* It appears, moreover, that legal and illegal materials are filed all together and an FBI supervisor communicating with the Justice Department will not always know which is which. Transcript of Proceedings, December 19, 1967, pp. 645, 671.

October Term 1965, p. 2, and the statement therein that the FBI investigation was "unrelated to the tax case."

The generality of the government's memorandum in this case forecloses inquiry as to the specifics of its procedures and the extent of its inquiry. Such matters may, it is suggested, appropriately be left to further briefing and argument upon rehearing. Compare *Black* v. *United States*, 385 U.S. 26 (1966). Clearly, however, the eminence of the persons who sit in secret judgment upon cases of illegal surveillance ought not to obscure the fact that the tribunal is governed entirely by what the FBI—or other erring agency—submits for consideration, is staffed by persons who are professional prosecutors, is dealing with the rights of defendants who in most cases are high on the list of persons whom the government would like to convict, and is proceeding by means historically thought to conduce to the suppression of truth rather than its discovery.

II. The Justice Department's Mode of Examination Finds No Justification in Law

Petitioners will not here repeat the central contentions they have already made. Four additional observations are called forth by the government's memorandum.

1. Even if the government's committee of lawyers be thought of as an *ad hoc* non-judicial administrative tribunal, its procedures offend against the fundamental canons of fairness embodied in, for example, the Administrative Procedure Act, 5 U.S.C. §§ 554-57. They also violate due process of law. *United States*

v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924) (Brandeis, J.).

2. The control of the intradepartmental proceedings by the offending agency itself raises an additional serious problem. The agents are not subjected to cross-examination; the scope of inquiry can never be as broad as when opposing counsel are present to press for additional facts and documents. Less than a month ago, this Court affirmed the necessity of obtaining the intervention of a disinterested magistrate whenever a *prima facie* lawful search is to be conducted by electronic means. *Katz* v. *United States*, 36 U.S.L.W. 4080, 4083 (December 18, 1967). Were it otherwise, the Court said, individuals would be "secure from Fourth Amendment violations 'only in the discretion of the police.' " *Ibid.* In light of this declaration, can the government seriously claim that there need be no judicial intervention *after* an admittedly illegal search, to determine to what extent the defendant's rights have been violated?

3. The government's concept of the credit to be given to statements by an "officer of the court" is contrary to that expressed in decisions of this Court. As noted above, the representations of such officers can rest upon no higher plane than the reliability of their informants, who are the persons responsible for the illegality in the first place. Second, in the analogous Jencks Act situation, this Court has viewed the role of officer of the court differently. *Campbell* v. *United States*, 365 U.S. 85, 96 (1961). Third, the government asserts by way of analogy that a certificate that there was *no* illegal surveillance could probably not be controverted. Gov't. Mem., p. 4. Peti-

tioner respectfully suggests that such a certificate should in every case be subject to inquiry to determine the extent of the search by government counsel through government files. Finally, the government's entire discussion of the role of prosecutors and of its review board appears to rest upon a presumption of regularity which customarily attaches to the operations of government. But as a district judge has remarked about another bit of government malfeasance, in *United States* v. *Procter & Gamble Co.*, 174 F. Supp. 233, 237 (D.N.J. 1959), on remand from this Court in *Procter & Gamble Co.* v. *United States*, 356 U.S. 677 (1958):

> "[T]his presumption of regularity . . . is effective, like other presumptions of fact, only in the absence of evidence to the contrary."

The "evidence to the contrary" is in, given the disclosures thus far of illegal surveillance.

4. Permeating the government's memorandum is solicitude for persons about whom disclosed electronic surveillance may contain embarrassing facts, Gov't Mem., p. 4, and for the time of the courts who must review the results of the government's illegality. If it is embarrassment to third parties—rather than to itself—which is the government's concern, their rights can be protected by appropriate orders under Federal Rule of Criminal Procedure 16(e). See *Dennis* v. *United States*, 384 U.S. 855, 875 (1966). The second consideration—economy of judicial time—is also important, but it is singularly inappropriate that the attorney for a confessed lawbreaker should invoke it as a reason for not having his client haled into court.

CONCLUSION

The government's memorandum establishes all the more urgently, it is submitted, the need for authoritative guidance by this Court concerning the circumstances under which electronic surveillance should be disclosed. The question raised in the petition for rehearing and squarely faced in the government's reply is by the government's own admission central to the administration of the mass of illegally-obtained material now in the government's possession, and therefore to the administration of criminal justice in a large and important class of cases.

Respectfully submitted,

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